

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C. 20554**

In Re	)	
	)	
Amendment of Section 73.658(g) of	)	
The Commission's Rules -- The Dual	)	MM Docket No. 00-108
Rule.	)	

**REPLY COMMENTS OF**  
  
**UNITED CHURCH OF CHRIST, OFFICE OF COMMUNICATION, INC.**  
  
**CONSUMER FEDERATION OF AMERICA**  
  
**AND**  
  
**THE CENTER FOR MEDIA EDUCATION**

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TION, INC., THE CONSUMER FEDERATION OF AMERICA, AND THE CENTER FOR  
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The United Church of Christ, Office of Communication, Inc., the Consumer Federation of America, and the Center for Media Education (collectively "UCC, *et al.*"), submit these reply comments in the above captioned proceeding.

**INTRODUCTION**

The Commission proposes eliminating one of the few remaining safeguards assuring diversity of voices in broadcasting: the Dual Network Rule. Although the Commission concedes that "relaxation of the rule may adversely affect our goal of diversity in broadcasting," *NPRM* at ¶27, the Commission dismisses this concern by observing that "entry of new, over the air broadcast networks *may* have diminished in importance relative to twenty years ago." *Id.* Accordingly, the *NPRM* proposes to allow vertically integrated networks to further combine their production and distribution resources by permitting them to own "emerging networks" such as UPN and WB.

Incredibly, however, some large broadcasters are not content with the Commission's proposal

to relax the dual network rule to allow acquisition of "emerging" networks. They urge complete abolition of the Dual Network Rule and other restrictions on ownership not part of this proceeding. Other commenters support adopting the NPRM solely for the purpose of allowing Viacom to keep UPN, or urge the Commission to grant Viacom a permanent waiver of the rule as part of this proceeding.

UCC, *et al.* strenuously object both to the relaxation of the Dual Network Rule and to the proposals to further relax or abolish the Commission's few remaining rules restraining industry consolidation. In addition, UCC, *et al.* do not believe that the Commission should relax a general rule as a means of providing targeted relief for one company. To the extent special circumstances justify allowing Viacom to keep UPN, the Commission has the power to consider those questions in a separate waiver proceeding.

## **ARGUMENT**

### **I THE NPRM IGNORES THE VITAL FIRST AMENDMENT ISSUES THAT ANIMATE THE DUAL NETWORK RULE.**

The Dual Network rule is one of the Commission's oldest rules promulgated under its public interest standard. *See National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Contrary to the impression one would gather from reading the *NPRM*, the purpose of the rule has nothing to do with the cost of television programming as an economic good. Rather, as the Commission has previously observed, the rule "serve[s] the general objectives of *maximizing diversity of viewpoint* and encouraging competition in the communications industry." *In re Review of the Commission's Regulations Governing Programming Practices of Broadcasting Networks and Affiliates, Notice of Proposed Rulemaking*, 10 FCCRcd 11951, 11955 (1995).

The *NPRM* pays virtually no attention to these considerations. Rather, the *NPRM* focuses exclusively on the cost of producing network programming and concludes that allowing emerging networks to be acquired by major networks will allow the emerging networks to reduce costs. *NPRM* at ¶26.

The Commission's rules, however, are not about reducing costs to the networks. Rather:

It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

*Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969).

Yet the order addresses these critical concerns with a few footnotes and cursory speculation. The *NPRM* concedes that relaxing the rule will reduce the number of independent voices in the medium. *NPRM* at ¶27. The Commission does not, however, explain how it will compensate for this loss. Instead, the *NPRM* states in a footnote that "modern economics literature on program choice carefully examines where *fewer* networks *may* broaden variety of network programming." *Id.* n.30. (emphasis in original).

The Commission does not explain these "special circumstances," or, indeed, whether they actually apply here. Nor does the Commission appear to expect them to apply. The benefits cited by the *NPRM* do not include any increase in diversity of programming choices, only reduction in costs through broadcasting the *same* programming through the broadcast network and affiliated network stations. *Id.* ¶26.

**A. The Commission's Speculation That Diversity In Broadcast Networks No Longer Matters Is Contrary To Fact.**

In the past, the Commission has always regarded the number of independent voices as a

critical element in maintaining diversity of views. *See, e.g., In re Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCCRcd 12903, 12910-17 (1999) ("*Local Broadcast Ownership Order*"). It is utterly inconsistent with the Commission's precedent to treat the reduction of independent voices in the national broadcast market as inconsequential.

Apparently realizing this inconsistency, the *NPRM* speculates that the growth of alternate MVPD networks has "diminished the importance" of diversity in broadcasting networks. *NPRM* at ¶27. The Commission supports this astounding suggestion with nothing more than a few platitudes -- platitudes which are, in fact, false to fact.

Broadcast television remains the one true mass medium, drawing the largest percentage of viewers night after night. The most successful cable network shows attract a rating share of two percent. This compares to the *least* successful broadcast network television shows. By contrast, a successful television show such as CBS' *Survivor* can draw an audience of over 40 million viewers. It defies reason to say that the two media are, at this point, comparable.

Several broadcasters urge the Commission to treat the development of the Internet as comparable to the creation of an infinite number of broadcast networks, thus relieving broadcasters of their responsibilities. *See, e.g., Viacom Comments* at 15-17. This argument is absurd. Even excluding the reasons given by the Commission in its recent review of its broadcast regulations as to why the Internet does not provide comparable substitute for broadcast programming, *see Biennial Report* 15 FCCRcd 11058, 11106-07 (2000), the Internet does not even begin to attract the same level of audience draw or funding for content projects as network television.

Finally, by the Commission's own estimates, only 1 million residential customers subscribe to broadband services that make streaming media even vaguely comparable to video programming.

*Deployment of Advanced Telecommunications: Second Report*, ¶67. To treat it as a substitute for broadcast television programming is simply ludicrous.

**B. The *NPRM*'s Speculation That Diversity Might Improve Is Not Born Out By The Objective Facts.**

In the last 10 years, Congress and the Commission have relaxed or eliminated the rules protecting diversity of viewpoint within the broadcasting market. As part of the Telecommunications Act of 1996, Congress increased the national ownership cap to 35% national audience reach. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat 56, §202(c). The Commission has eliminated the rules preventing networks from holding financial interests in syndicated television programs, *In re Evaluation of the Syndication and Financial Interest Rules*, 8 FCCRcd 3282 (1993), and relaxed the rule preventing licensees -- including the networks -- from holding more than one television station in a market. *Local Broadcast Ownership order*, 14 FCCRcd 12903 (1999).

As a result, diversity of viewpoint has nearly completely disappeared, and with it the benefits of diversity. As Commissioner Tristani observed in her dissent to the Biennial Report which first proposed relaxing the Dual Network rule, 24 of 37 new series are either owned or co-owned by the television networks which will air them. *Biennial Report*, 15 FCCRcd at 11162. It is difficult to imagine how relaxing the few remaining safeguards further will magically cause this situation to reverse itself.

**II. THE REQUESTS BY MAJOR BROADCASTERS FOR ELIMINATION OF FURTHER DIVERSITY SAFEGUARDS SHOULD BE REJECTED.**

The arguments of Viacom, Fox, and other large broadcasters seeking to have the entire dual network rule eliminated should be rejected outright. As detailed above, even the limited relaxation of the rule proposed in the *NPRM* represents a significant step backward for viewpoint diversity in

the television broadcast market. Elimination of the rule would merely hasten the continuing trends of industry consolidation and the disappearance of independent program developers.

The parties seeking repeal of the Commission's few remaining safeguards to diversity of viewpoint introduce no new arguments that the Commission did not consider and reject in the *Biennial Report*. The Commission should therefore reject these comments as offering no new matters for consideration.

For example, the WB Television Network argues that the cable cross-ownership rule is unconstitutional, WB Comments at 29-31, for precisely the same reasons rejected in the *Biennial Report*. *Biennial Report*, 15 FCCRcd at 11121-22. Paxson urges the Commission to lift the cross-ownership rules and the ownership caps, Paxson Comments at 5-8, but offers no more than the economic arguments the Commission rejected in the *Biennial Report*. While lowering the ownership cap might well make it easier for Paxson to grow in size, it would have a devastating effect on local diversity -- already nearly eliminated by continued industry consolidation under the existing limits.

In short, if the Commission insists on relaxing the Dual Network Rule, it should take care to do no further harm. Certainly nothing in the record here justifies any reversal of the Commission's conclusions just a few scant months ago rejecting precisely the relief requested here.

### **III. THE COMMISSION SHOULD NOT ELIMINATE THE RULE MERELY TO GRANT SPECIFIC RELIEF TO UPN.**

Many of the commenters suggest that a specific waiver of the rule for UPN is warranted. *See, e.g.,* Comments of the Board of Governors of the UPN Affiliates Association; Comments of the Minority Media and Telecommunications Council. There is no need to change the general rules to provide specific relief in this case.

The Commission always has the power to grant relief from the Dual Network Rule where specific circumstances warrant a waiver of the Rule. While members of the Commission have rightly decried permitting widespread violation of a rule through a mechanical grant of waiver relief, *see, e.g., Local Broadcast Ownership Order*, 15 FCCRcd at 12981 (Statement of Chairman Kennard) & 12984 (Statement of Commissioner Ness), that is hardly the case here.

Only a small number of entities are subject to the Dual Network Rule. There is no opportunity here for, in the words of Commissioner Ness, "gaming the rules" and creating broad uncertainty in the industry. If UPN truly presents a special case warranting general relief from the rule, granting such relief does not threaten the Commission's underlying rule or bring uncertainty to the industry. Conversely, that one of the few parties to whom the rule applies needs relief does not mean that the rule serves no purpose, or that the rule adversely affects the emergence of competing networks.

In addition, UCC, *et al.* observe that the Commission has already considered the specific case of UPN in the course of the CBS/Viacom merger, and determined that a 12-month waiver rather than permanent waiver was appropriate. *See In re Shareholders of CBS Corp. and Viacom*, 15 FCCRcd 8230, 8235 (2000). If, after making all possible efforts, Viacom cannot comply with the Commission's rule, it can seek a permanent waiver. Viacom will have every opportunity to prove its case, and the public will have notice opportunity to comment upon the evidence presented.

## CONCLUSION

The Telecommunications Act of 1996 required the Commission to raise the ownership caps, triggering the current consolidation in the broadcast industry. Last year, the Commission relaxed the duopoly rule, further reducing the outlets for diverse points of view. UCC, *et al.* urge the Commission not to reduce the few protections that remain, and request that the Commission not adopt the *NPRM*.

Respectfully submitted,

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